Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1998

GIUSEPPE GALLARA, a/k/a JOE STANFA,
Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,
Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BARRY M. FALLICK
Attorney for Petitioner-Appellant
666 Third Avenue - 17th Floor
New York, New York 10017
(212) 697-4090

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax: (718) 522-4024
1-800-531-2028

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to an evidentiary hearing to explore what guidelines, if any, the Department of Justice follows in its plea bargaining decisions.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are those named in the caption.

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In the Supreme Court of the United States
OCTOBER TERM 1998

GIUSEPPE GALLARA, a/k/a JOE STANFA,

Petitioner-Appellant,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Giuseppe Gallara petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is not reported but appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1998. The jurisdiction of this Court is involved under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner contends that he was denied his due process and equal protection rights because he was not offered the same plea bargain under the same terms as was offered to others similarly situated. He challenges the discriminatory exercise of prosecutorial discretion in the plea agreement process, and contends that he is entitled to an evidentiary hearing because he has made a substantial threshold showing.

Prior to trial, the government made two plea offers to petitioner. By letter dated January 5, 1996, the government advised defense counsel that if appellant were to plead guilty without cooperating, his total Base Offense Level was 42. Following further negotiations, the government, on January 18, 1996, sent a proposed plea agreement to defense counsel, which called for a total Base Offense Level of 40. The guideline range for this offense level was 292 to 365 months' imprisonment.

Petitioner's Pro Se Motion

On or about February 1, 1996, petitioner filed a *pro se* motion entitled "Motion for Equal Treatment and Entitlement to Plea Agreement as that of Similarly Situated Defendants". In support of this motion, he alleged that the plea agreement offered to him by the government was "unconscionable: because it required him to plead guilty to an offense which would expose him to a much harsher sentence than that which "members of major La Cosa

Nostra (organized crime) families located in the New York and New Jersey area" have been exposed to as a result of entering into plea agreements with the government. He further argued that the government had engaged in selective prosecution by favoring organized crime members from major La Cosa Nostra families with less harsh plea agreements than organized crime members from Philadelphia. Petitioner made this argument by attaching a number of agreements and plea allocutions from districts in New York and New Jersey where various defendants were permitted to plead to 18 U.S.C §1959(a)(5).

The Decision of the District Court

On February 20, 1996, the district court issued a summary order denying petitioner's motion.

The Decision of the Court of Appeals

The Court of Appeals held that petitioner's showing was far short of that necessary to warrant an evidentiary hearing.

REASONS FOR GRANTING THE WRIT

1. The decision below raises significant questions concerning a prosecutor's duty to comply with equal prosecution requirements when conducting plea bargaining.

This absolute control by prosecutors over the plea bargaining process has led to characterizations of the prosecutor as an "unregulated monopoly," capable of changing at will the "going rate" for a particular category of crime. Donald G. Gifford, *Meaningful Reform of Plea*

Bargaining: The Control of Prosecutorial Discretion, 1983 U. Ill. L. Rev. 37, 15 45. The reluctance of courts to interfere in the process further buttresses the prosecutor's monopoly over plea bargaining. Court presume that prosecutors exercise their discretionary powers in good faith and require a strong showing of proof before inferring that a prosecutor has abused his discretion.

This high standard of proof affords prosecutors tremendous leeway in exercising their discretionary powers. *See McClusky v. Kemp*, 481 U.S. 279, 297 (1987) ("Because discretion is essential to the Criminal Justice process, we would demand an exceptionally clear proof before we would infer that the discretion has been abused.") Yet, as previously noted, a prosecutor's discretion in exercising that power is not absolute but subject to certain constitutional limitations. *Wade v. United States*, 504 U.S. 181, 185 (1992); *United States v. Redando-Lemis*, 955 F.2d 1296 (9th Cir. 1992). In *Redando-Lemos*, Judge Kozinski acknowledged that governmental decisions which have a profound effect on the life and freedom of individuals must conform to the constitutional requirement of due process." 955 F.2d at 1298-99. In *Redando-Lemos,* the Court of Appeals held "that a prosecutor's charging decision cannot be judicially reviewed absent a *prima facie* showing that it rested on an impermissible basis such as gender, race or denial of a constitutional right." *Id* at 1300-01. *See, also, United States v. Davis*, 36 F.3d 1424, 1432 (9th Cir. 1994); *United States v. Diaz,* 961 F.2d 1417, 1420 (9th Cir. 1992); *United States v. Bernal-Rojas,* 933 F.2d 97, 99 (1st Cir. 1991).

Finally, in *United States v. Bell,* 506 F.2d 207 (D.C. Cir. 1974), that Court of Appeals noted that prosecutors must comply with equal protection requirements when conducting plea bargaining:

> Similarly situated defendants should be afforded equal plea agreement opportunities. That standard the American Bar Association adopted six years ago. Such equality is needed, ABA says, to reach desired correctional goals and to protect the process from attack on equal protection grounds.

Id. at 221.

In the instant case, appellant submitted documentary proof that demonstrated a pattern of unequal administration of the law. *See Oyler v. Boles*, 362 U.S. 448, 456 (1962). Indeed, the government, in its response to the appellant's *pro se* motion and the proof that he submitted, acknowledged "that some organized crime defendants in other jurisdictions may have received extremely favorable deals from the government." [*See* p.7 of the Government's Response dated February 14, 1996].

Obviously, prosecutorial discretion in law enforcement is by its very nature exceedingly broad. The conscious exercise of some selectivity in enforcement is not in and of itself a federal constitutional violation, but only so when the selection is deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification. Here, appellant is entitled to a hearing to explore what guidelines, if any, the Department of Justice followed in deciding which defendants were permitted to plead to lesser-included offenses. As Judge

Canby noted in his concurring opinion in *Redando-Lemos*, a due process inquiry would not be precluded "in a case of pure arbitrariness, such as a coin toss decision." 955 F.2d at 1304, fn.1.

CONCLUSION

For these reasons, a Writ of Certiorari, should issue to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

BARRY M. FALLICK, ESQ.
Counsel of Record
ROCHMAN PLATZER FALLICK & STERNHEIM, LLP
666 Third Avenue, 17th Floor
New York, New York 10017
(212) 697-4090

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1370

UNITED STATES OF AMERICA
v.
GIUSEPPE GALLARA,
a/k/a JOE STANFA

Giuseppe Gallara, Appellant

Appeal from the United States District Court For the
Eastern District of Pennsylvania
(D.C. Crim. No. 94-cr-00127-14)
District Judge: Honorable Ronald L. Buckwalter

Submitted Pursuant to Third Circuit LAR 34.1(a)
June 12, 1998

BEFORE: STAPELTON, COWEN and RENDELL,
Circuit Judges

(Opinion filed July 28, 1998)

MEMORANDUM OPINION OF THE COURT

STAPLETON, *Circuit Judge:*

I.

Appellant Guiseppe Gallara was tried along with four other defendants in a jury trial. A jury found Gallara guilty of racketeering, racketeering conspiracy and committing a violent crime in aid of a racketeering conspiracy. The jury also found Racketeering Act One (conspiracy to murder rival gang faction of Joseph Merlino) and Racketeering Act Three (murder of Frank Baldino) to be proven.

Gallara contends that he was denied his due process and equal protection rights because he was not offered the same plea bargain as was offered to others similarly situated. He challenges the discriminatory exercise of prosecutorial discretion in the plea agreement process, and contends that he is entitled to an evidentiary hearing because he has made a substantial threshold showing.

Gallara also argues that the district court erred in denying his pretrial motions to suppress two handguns with ammunition seized in violation of the Fourth Amendment.

II

A defendant raising a selective prosecution claim must show two things: First, that he was in fact singled out by the prosecutor, and second, that the prosecutor acted with an improper purpose in singling him out. The Third Circuit has stated the selective prosecution test as follows:

> To establish a claim of selective prosecution, [the defendant] must demonstrate two factors. First, he must provide evidence that persons similarly situated have not been prosecuted . . . Second, he must show that the decision to prosecute was made on the basis of an unjustifiable standard, such as race, religion, or some other arbitrary factors, or that the prosecution was intended to prevent his exercise of a fundamental right.

United States v. Schoolcraft, 879 F.2d 64, 68 (3d Cir. 1989). *See Holder v. City of Allentown*, 987 F.2d 188, 198 n.3 (3d Cir. 1993) (discussing the Third Circuit's standard for discriminatory prosecution and quoting *Schoolcraft*); *Government of Virgin Islands v. Harrigan*, 791 F.2d 34, 36 (3d Cir. 1986).

To show that others similarly situated received more favorable plea agreements, Gallara provided the names of eight defendants from five cases since 1988, all of whom were prosecuted outside of the Eastern District of Pennsylvania. He contends that these defendants entered pleas in the federal courts in New York and New Jersey to 18 U.S.C. § 1959(a)(5), thereby limiting their exposure to no more than ten years. Other than offering conclusory allegations, Gallara has not shown how the defendants in these cases were similarly situated. He has not even alleged that any of the eight individuals he cited in those five cases were the shooters in a homicide.

Nor has Gallara shown any reason to believe that the government was motivated by a constitutionally objectionable standard in conducting its plea negotiations with him.

The mere allegation of a denial of equal treatment does not require discovery or an evidentiary hearing. *See United States v. Bassford*, 812 F.2d 16, 19 (1st Cir. 1987) (defendant must allege some facts (a) tending to show that he had been selectively prosecuted; and (b) raising doubt as to propriety of the prosecution's purpose); *United States v. Silien*, 825 F.2d 320, 322 (11th Cir. 1987) (defendant was not entitled to evidentiary hearing because he had not presented facts sufficient to create a reasonable doubt about the constitutionality of the prosecution); *United States v. Bustomonte*, 805 F.2d 201, 202 (6th Cir. 1986) (evidentiary hearing should be held only if defendant "raises a reasonable doubt as to the prosecutor's purpose"). Gallara's showing was far short of that necessary to warrant an evidentiary hearing. The district court did not abuse its discretion in denying one.

III

The district court, after an evidentiary hearing, found as a fact that the stop of his car on January 4, 1994 was attributable to traffic violations. There is ample evidence to support this finding, which is not clearly erroneous. Moreover, in *Whren v. United States*, 116 S.Ct. 1769 (1996), the Court held that a traffic stop is reasonable under the Fourth Amendment if a police officer has probable cause to believe that a traffic violation has occurred, even if the stop is a pretext for the investigation of a more serious offense. The officers clearly has probable cause here.

IV

Police served an arrest warrant on Gallara at his home on March 17, 1994. During a "protective sweep" of the second floor, they found a gun in plain view and seized it. It was admitted in evidence.

The district court concluded that under the facts which it credited the protective sweep was justified under *Maryland v. Buie*, 494 U.S. 325 (1990). We are not persuaded that it erred in doing so. moreover, had the admission of this evidence been error, it would have been harmless error.

V

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-1370

UNITED STATES OF AMERICA
v.
GIUSEPPE GALLARA,
a/k/a JOE STANFA

Giuseppe Gallara, Appellant

Appeal from the United States District Court For the
Eastern District of Pennsylvania
(D.C. Crim. No. 94-cr-00127-14)
District Judge: Honorable Ronald L. Buckwalter

Submitted Pursuant to Third Circuit LAR 34.1(a)
June 12, 1998

BEFORE: STAPELTON, COWEN and RENDELL,
Circuit Judges

JUDGEMENT

This case cam on to be heard on the record before the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.19a) on June 12, 1998,

On consideration whereof, it is

ORDERED AND ADJUDGED by this Court that

the judgment of the district court entered April 24, 1997, be and the same is hereby affirmed.

ATTEST:

S/_____
Acting Clerk

Dated: July 28, 1998